PUBLICATION

Four Myths of the Hobby Lobby Decision: Separating Fact from Fiction

Authors: Rachel VanNortwick Barlotta
July 17, 2014

You have probably heard that the United States Supreme Court rendered a decision in a case involving the arts and crafts store Hobby Lobby pertaining to contraception coverage for its employees under the Patient Protection and Affordable Care Act (ACA). *Burwell v. Hobby Lobby Stores, Inc.*, ___ U.S.__ (June 30, 2014). Although the ACA itself is silent on the issue of contraception, the Department of Health and Human Services (HHS) passed a regulation that requires ACA-covered employers to provide 20 types of birth control, including four which may prevent an already fertilized egg from developing further, including certain intrauterine devices (IUDs) and what is commonly referred to as the "morning after" pill. For religious reasons, the family owners of Hobby Lobby objected to paying for the four types of contraception which are considered to be abortifacients.

Hobby Lobby is a closely-held corporation. It is owned exclusively by a married couple and their three children. Hobby Lobby provided the 16 other methods of birth control to its employees as part of its health care plan at no charge. Hobby Lobby filed a lawsuit in federal court seeking to restrain the enforcement of the HHS regulation against it only as it pertained to the four methods of contraception which it found to be objectionable. The case wound its way through the federal court system until it landed before the United States Supreme Court.

In addition to First Amendment objections, Hobby Lobby's opposition to the contraceptive regulation was based upon the Religious Freedom Restoration Act of 1993 (RFRA). The RFRA "prohibits the "Government [from] substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability" unless the Government "demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. §§2000bb-1(a),(b).

The Court first had to determine whether a closely held, for-profit corporation is a "person" entitled to protections under the RFRA. Because the RFRA does not define the term "person," the Court turned to the Dictionary Act for guidance. Federal courts are required to consult the Dictionary Act "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise." 1 U.S.C. § 1. Under the Dictionary Act, the term "person" includes "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." In light of this definition and the HHS's concession that "person" included nonprofit corporations, the Court determined Hobby Lobby was a "person" entitled to protections under the RFRA.

The Court further determined the contraceptive regulations substantially burdened the exercise of religion. In so doing, the Court emphasized the harsh financial penalties ranging in the millions of dollars that Hobby Lobby would be required to pay if it either refused to provide objectionable contraceptives at no cost or failed to offer insurance coverage to its employees.

The Court next had to determine whether the contraception regulation was is in furtherance of a compelling governmental interest, and, if so, if the regulation was the least restrictive means of furthering that compelling governmental interest. The Court assumed, without expressly deciding, that guaranteeing cost-free access to the four challenged contraceptive methods is a compelling government interest. However, the Court

determined that mandating that all ACA-covered employers provide all 20 forms of contraception was not the least burdensome means to accomplish its goal. Specifically, the Court noted the federal government could assume the cost of providing the four contraceptives at issue. The Court also noted that, in the alternative, the federal government could shift the costs of objectionable contraceptives to the insurers as it had done for religious non-profit organizations. Ultimately, by a narrow 5-4 majority, the Court held "[t]he contraceptive mandate, as applied to closely held corporations, violates the RFRA." The Court did not reach Hobby Lobby's constitutional arguments under the First Amendment.

The decision has evoked strong sentiments in favor and against the Court's ruling. In the wake of all of the hype, misinformation abounds concerning what the decision means for employers and their obligations under the ACA. We will dispel some of the common misperceptions about the ruling.

1. Any employer that does not want to provide contraceptive coverage to its employees is free to ignore the ACA regulation mandating that certain forms of birth control be provided at no cost to its employees. This is false. The Court's decision was extremely narrow. It applies only to closely held companies. The Court specifically noted that it would be unlikely that a publicly traded company would or could successfully assert the objections raised by Hobby Lobby.

In addition, the closely held company must have bona fide religious objections to the contraceptive mandate. Hobby Lobby has a formal mission statement that states it operates under Biblical and Christian principles. It adopted other practices, such as remaining closed on Sundays, to adhere to these principles.

2. The Hobby Lobby decision changes the contraceptive coverage requirements for all employers. This is false**.** The decision only impacts ACA-covered, closely held companies with bona fide religious beliefs. Companies with 50 employers or less are not required to provide health insurance at all under the ACA. Also, employers with grandfathered health plans, those that existed prior to March 23, 2010, and that have not made specified changes thereafter, are not required to comply with many parts of the ACA, including the contraceptive mandate. In the decision, the Court noted that roughly 84 million of 154 million employees who have insurance coverage under employer-sponsored health care plans fall into these latter categories and thus were not covered by the contraceptive mandate even before the Hobby Lobby decision.

3. The Hobby Lobby decision likely paves the way for employers to avoid other parts of the ACA. This is false. The Court cautioned that its decision was concerned "solely" with the contraceptive mandate and that it "should not be understood to hold that insurance-coverage mandate must necessarily fail if it conflicts with an employer's religious beliefs." As an example, the Court pointed to immunization as an area in which a religious objection may very well fail as there may be no less restrictive means to preventing the spread of infectious diseases.

4. The Hobby Lobby decision is likely the final word on whether or not all employers will be required to provide no-cost contraceptive coverage to employees in the future. This is likely untrue. The Supreme Court's decision was based upon a federal statute instead of constitutional grounds. Thus, Congress could amend the RFRA or the ACA to expressly exempt the contraception mandate from religious objections. Congress could also amend the RFRA to exclude coverage of for-profit companies. Indeed, Senate Democrats have already proposed legislation to bar for-profit corporations from seeking exemptions from the ACA's mandate that their health plans cover contraception costs.